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No. 83-722

In the Supreme Court of the United States

OCTOBER TERM, 1983

ORVILLE MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below improperly applied the "law of the case" doctrine to bar him from introducing additional evidence, after a suppression ruling in his favor was reversed, to show that he had "standing" to litigate a motion to suppress evidence.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of conspiring to commit those offenses, in violation of 21 U.S.C. 846; and one count of using a communication facility in the commission of those offenses, in violation

of 21 U.S.C. 843(b).[1] He was sentenced to an indefinite commitment pursuant to the Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed (Pet. App. 1-6).

a. The evidence at trial, the sufficiency of which is not challenged here, showed that in April 1980 petitioner, along with co-defendants Walter McMahon and Joe Abbott, conspired to sell more than two pounds of cocaine. Their scheme was frustrated when their purchaser turned out to be an undercover agent of the Drug Enforcement Agency.

On the evening of April 22, 1980, DEA Agent James Marshall, acting in an undercover capacity, met with petitioner, Abbott, and a confidential informant who had arranged the meeting. Negotiations for the sale of drugs ensued. It was ultimately agreed that petitioner and Abbott would sell two kilograms of cocaine to Marshall (Tr. 60-66, 119). Abbott said that he would call Marshall the next day concerning delivery of the drugs (Tr. 64).

The next day, Agent Marshall, accompanied by undercover DEA Agent Ruth Beaver, again met with petitioner, Abbott, and the informant. Beaver showed a roll of money to the others; while petitioner left briefly to make a telephone call, Abbott counted it (Tr. 67-68). When petitioner returned, Beaver departed. After some intermediate stops, at which petitioner made additional telephone calls, Marshall explained to petitioner and Abbott that he would call Beaver to tell her where to bring the money after he had seen the cocaine (Tr. 69-71, 168).

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[1]Walter McMahon, Joe E. Abbott, and Steven Hudlow were indicted with petitioner. McMahon was convicted in a joint trial with petitioner and was sentenced to 12 years' imprisonment, a 10-year term of special parole, and a fine of $15,000. His conviction was also affirmed in the decision below. Abbott stood trial separately; his conviction was affirmed in an unreported decision. *United States* v. *Abbott*, 665 F.2d 352 (11th Cir. 1981) (table). The charges against Hudlow were dismissed.

Marshall, Abbott, and petitioner then drove by a circuitous route to co-defendant Steven Hudlow's apartment (Tr. 71-74, 168-170). Petitioner and Marshall went inside, while Abbott remained in the parking lot as a lookout (Tr. 73-74). Shortly thereafter, Hudlow and McMahon came to the apartment with a box. After a few minutes, petitioner called Marshall into the bedroom and showed him a bag containing approximately two pounds of white powder. Once Marshall tested the powder and determined that it was cocaine, McMahon said that their selling price was $58,000; McMahon also said that the cocaine would not leave the apartment until the money arrived (Tr. 75, 77, 155).

Marshall then telephoned Beaver and advised her that the cocaine was at the apartment. After Marshall left with Hodlow to get the money from Beaver, surveilling agents knocked on the door to the apartment and announced themselves. When they received no answer, they broke down the door and discovered petitioner and McMahon inside. McMahon indicated that the cocaine was in the bathroom; the drugs were found in a cabinet under the sink (Tr. 77, 80, 171).

b. Prior to trial, petitioner and McMahon moved to suppress the cocaine discovered in Hudlow's apartment. The district court ruled that they had "standing" to seek suppression and that the agents' search of the bathroom cabinet was illegal. On the government's appeal, the court of appeals reversed, holding that petitioner and McMahon, as visitors to Hudlow's apartment, had no expectation of privacy in the bathroom cabinet. *United States* v. *Meyer*, 656 F.2d 979, 981-982 (5th Cir. 1981).

On remand, petitioner sought to reopen the suppression hearing. Based on the magistrate's statement at the previous hearing that petitioner would be allowed to testify at the end of the proceeding if he would otherwise be found to lack

standing, petitioner argued that he had not been given an adequate opportunity to establish his standing (Pet. App. 4; Tr. 23-24). The district court declined to reopen the hearing, finding that the issue was foreclosed under the "law of the case" doctrine by the ruling on the earlier appeal (Pet. App. 4; Tr. 27).

The court of appeals affirmed. It found that the decision in the prior appeal had considered and rejected petitioner's claim that he was entitled to a further hearing on remand with respect to the issue of "standing" (Pet. App. 4).

2. Petitioner argues (Pet. 3-9) that the courts below erroneously applied the "law of the case" doctrine to preclude him from further litigating his claim that he had an expectation of privacy in Hudlow's bathroom cabinet. Petitioner's argument was correctly rejected by the district court and the court of appeals, and further review of this fact-bound issue is not warranted.

"Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances." *Hayman Cash Register Co.* v. *Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). The purpose of this doctrine is to promote the "judicial system's interest in finality and in efficient administration," *Todd & Co.* v. *SEC*, 637 F.2d 154, 156 (3d Cir. 1980). See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 678 (D.C. Cir. 1981); *Morrow* v. *Dillard*, 580 F.2d 1284, 1289 (5th Cir. 1978); *White* v. *Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967); 1B *Moore's Federal Practice* para. 0.404[1] (1983).

The "law of the case" doctrine was correctly applied here. As the court of appeals below explained (Pet. App. 4), petitioner in the earlier appeal sought a new suppression hearing on remand, and this claim was necessarily rejected

by the court's disposition of the appeal.[2] In light of that decision, the courts below properly declined, under "law of the case" principles, to reopen the suppression hearing in order to allow petitioner the relief that had been denied on the previous appeal.

Furthermore, the court of appeals correctly held in the previous appeal that petitioner lacked standing and that a remand for additional proceedings was not required because petitioner failed even to allege facts sufficient to meet his burden of establishing standing (656 F.2d at 981-982). See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978). Petitioner filed no motion to suppress but simply joined in the motions of his co-defendants, which did not address the issue of his standing. Prior to the testimony at the suppression hearing, the magistrate stated her understanding that petitioner claimed standing based on his presence as an invited guest in Hudlow's apartment (8/12/80 Supp. Tr. 13), and defense counsel confirmed the correctness of that understanding (*ibid.*). The government contested petitioner's standing on the ground that he had no reasonable expectation of privacy in the apartment in general or in the cabinet in the bathroom where the cocaine was found (*ibid.*). The magistrate reserved ruling on the question until the testimony had been presented (*id.* at 13-14), saying that she was "going to allow [counsel] to fully participate in the motion to suppress on [petitioner's] behalf" (*id.* at 14) and that "[a]t the end of the hearing I'll determine the standing issue as to [petitioner]" (*ibid.*). When the government emphasized that petitioner had the burden to "come forward with testimony sufficient to show that he does have standing" (*ibid.*), the

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[2]We note that on the panel below were two judges who had sat on the previous appeal, including the author of the earlier opinion.

magistrate made the following comment, which is the basis for petitioner's claim (*id.* at 15):

> I'm trying to give everyone the benefit of a maximum amount of participation, both the Government, as well as the Defendants. Obviously, when this is all over, if I believe that [petitioner] does not have standing in all or part of, I am going to give [defense counsel] notice of that effect and, then, at that time if he wishes to bring [petitioner] forward to allow [petitioner] to testify and establish his standing, I will permit him to do so.

Petitioner in fact testified in his own behalf at the suppression hearing (8/12/80 Supp. Tr. 108-124). He stated that he was in Hudlow's apartment as an invited guest (*id.* at 108, 112-113) and that at no time did he go into the bathroom where the cocaine was hidden (*id.* at 116, 118). Petitioner's testimony was not restricted by the magistrate in any way, and it neither presented nor sought to present any facts that would have supported his standing except as an invitee. Following the testimony, the magistrate indicated that she would "reserve ruling on [petitioner's] standing until I've had an opportunity to digest the testimony and look at it" (*id.* at 140); again, petitioner raised no other theory of standing and sought to introduce no additional facts. Finally, the government argued that petitioner had no reasonable expectation of privacy and therefore did not have standing (*id.* at 141-142, 154, 158), specifically referring to "the absence of any testimony to the contrary" that petitioner was without a privacy interest in the bathroom area (*id.* at 142); as before, petitioner offered no further legal arguments or facts and relied solely on his status as an invitee (*id.* at 158-159). In these circumstances, the court of appeals in the first appeal, after holding that petitioner did not have standing as an invited guest, correctly ruled that

the record did not justify a remand to reopen the suppression hearing. Petitioner's assertion that he was unfairly prejudiced by his reliance on the comments of the magistrate is unfounded.

Finally, petitioner's citation (Pet. 8) to *Combs* v. *United States*, 408 U.S. 224 (1972), does not support his position. In *Combs*, the government had not contested the defendant's standing to move for suppression, and there had been no consideration of the issue in the lower courts. Here, in contrast, the court of appeals in the previous appeal addressed the merits of petitioner's standing; and in so doing, it found that petitioner had not even alleged a sufficient basis to overcome the government's challenge to his standing and that he was not entitled to further proceedings on remand to establish his claim.[3] Compare *United States* v. *Salvucci*, 448 U.S. 83, 95 (1980) (remand on separate issue of actual standing after rejection of automatic standing in initial appeal).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[3]Petitioner's claim (Pet. 8-9) of an intra-circuit conflict with *United States* v. *Bachner*, 706 F.2d 1121 (11th Cir. 1983), does not call for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, *Bachner* is not inconsistent with the decision below. In that case, the magistrate had ruled out introduction of any evidence on the question of standing, and the court of appeals remanded for the development of a factual record. Here, on the other hand, the court of appeals rejected petitioner's contention on the merits in the previous appeal, concluding from the record that there was no need to remand for further proceedings as petitioner had requested.

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